

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IRACING.COM MOTORSPORT SIMULATIONS,
LLC, a Delaware Limited Liability Company,

Plaintiff,

v.

TIM ROBINSON, individually and d/b/a
www.ow-racing.com, www.torn8oalley.com and
www.First-Racing-Sucks.com,

Defendant.

X

Civil Action No.

05-11639 NG

MOTION TO COMPEL
DISCOVERY RESPONSES
AND SUPPORTING
MEMORANDUM

X

Defendant Tim Robinson has defaulted on the following discovery requests issued by plaintiff iRacing.com Motorsport Simulations, LLC's ("iRacing"): (1) second requests for production of documents; and (2) first interrogatories (collectively, the "Pending Discovery Requests").¹ Accordingly, iRacing respectfully moves this Court pursuant to Fed. R. Civ. P. 37(a)(2)(B), 37(a)(4), 37(d) and LR 37.1 to: (a) compel Robinson to respond to the Pending Discovery Requests; (b) hold that, because Robinson did not timely respond to the Pending Discovery Requests, he has waived any objection he may otherwise have had to the Requests; and (c) award iRacing the attorneys' fees and costs it incurred in attempting to obtain Robinson's responses.

¹ iRacing attaches true and correct copies of the Pending Discovery Requests as Exhibits A and B, respectively.

I. Despite iRacing's Requests And Reminders, Robinson Failed To Respond To The Pending Discovery Requests And Is Stalling This Litigation

1. iRacing sued Robinson upon discovering that Robinson was offering for free download from the Internet unauthorized modifications to iRacing's auto racing simulation computer software, NASCAR® Racing 2003 Season, in violation of the United States copyright laws and Robinson's contracts with iRacing.

2. On September 23, 2005, iRacing served Robinson's counsel via United States mail with the Pending Discovery Requests. Pursuant to Fed. R. Civ. P. 6(e), 33(b)(3) and 34(b), Robinson was required to respond to the Pending Discovery Requests on or before October 26, 2005.

3. On October 11, 2005, after multiple unanswered emails asking Ryan to confirm a deposition date or offer alternative dates, iRacing served Robinson with a deposition subpoena setting Robinson's deposition for November 15, 2005, well after the due date for Robinson's responses to the Pending Discovery Requests.

4. Robinson defaulted on his discovery responses to the Pending Discovery Requests, having sought and received no extension of time to respond. On October 31, 2005, Irwin Schwartz, iRacing's counsel, called Joseph Ryan, Robinson's counsel, to conduct a discovery tele-conference to determine why Robinson had not responded to the Pending Discovery Requests. In that tele-conference Ryan stated that he would look into it and shortly thereafter promised by e-mail that Robinson would serve responses to iRacing's interrogatories on or before November 4, 2005. Ryan did not indicate when Robinson respond to the document request (despite a follow-up email) and did not respond to multiple emails offering to discuss alternative deposition dates.

5. Robinson did not respond to iRacing's interrogatory requests by November 4, 2005.

6. Neither Robinson nor Ryan have asked iRacing's counsel for a further extension of time to respond to the Pending Discovery Requests, and neither Robinson nor Ryan have ever asked this Court for an extension of time to respond to the Pending Discovery Requests or for a protective order.

7. Accordingly, all issues regarding Robinson's failure to respond to the Pending Discovery Requests remain for this Court to decide.

II. This Court can and should compel Robinson to respond to the Pending Discovery Requests and sanction Robinson for failing to do so voluntarily.

A motion to compel is appropriate where a party fails to properly serve interrogatories or document requests. Fed. R. Civ. P. 37(a)(2)(B). In such a case, "the court in which the action is pending on motion may make such orders in regard to the failure that are just" and "shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(d); see also Fed. R. Civ. P. 37(a)(4).

Robinson failed, without substantial justification, to timely respond to the Pending Discovery Requests. This Court should compel his response. Fed. R. Civ. P. 37(a)(2)(B), (d). Further, this Court can and should penalize Robinson for failing to timely respond to the Pending Discovery Requests. See Fed. R. Civ. P. 37(d). This

penalty should take two forms. First, this Court should hold that Robinson has waived any objection he may otherwise have raised to the Pending Discovery Requests. See Demary v. Yamaha Motor Corp., 125 F.R.D. 20, 22 (D. Mass. 1989) (holding that, for failing to timely respond to discovery requests, “defendant will be deemed to have waived any objections to the interrogatories and requests”); 8 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2173, at 544 (1970)(quoted in Demary, 125 F.R.D. at 22). Second, this Court should award iRacing its attorneys’ fees and costs incurred in the Rule 37(a)(2)(B) and LR 37.1 processes as well as those it incurred and will incur in filing and prosecuting this motion. See, e.g., Demary, 125 F.R.D. at 22 (awarding fees and costs against dilatory party’s attorney); Reading Cycles, Inc. v. Cycom Corp., 112 F.R.D. 22, 24 (D. Mass. 1986) (because failure to timely respond to discovery requests was not “substantially justified,” dilatory party must pay movant’s expenses “in preparing and filing a motion to compel in order to get [responses] which it was entitled to receive . . . without the necessity of filing a motion to compel”); see also Fed. R. Civ. P. 37(a)(4), (d).

WHEREFORE, iRacing respectfully requests that this Court enter its Order:

- A. Granting iRacing’s motion to compel in all respects;
- B. Directing Robinson to respond to the Pending Discovery Requests, without any objection by no later than two weeks following the Court’s order;
- C. Holding that Robinson has waived any and all objections to the Pending Discovery Requests; and

D. Awarding iRacing all of its attorneys' fees and costs incurred in the Rule 37(a)(2)(A) and LR 37.1 processes, as well as those iRacing incurred and will incur in prosecuting this motion.

Dated: November 7, 2005

Plaintiff iRACING.COM MOTORSPORT
SIMULATIONS, LLC, a Delaware Limited
Liability Company
By its attorneys,

/s/ Irwin B. Schwartz

Irwin B. Schwartz (BBO# 548763)
Lisa Lee Jordan (Pro Hac Vice)
Petrie Schwartz LLP
500 Boylston Street, Suite 1860
Boston, Massachusetts 02116
(617) 421-1800

Certification Under LR 37.1(B)

I, Irwin B. Schwartz, attorney for Plaintiff iRacing.com Motorsport Simulations, LLC, hereby certify that I complied with Local Rule 37.1 as set forth above in that I conducted a discovery teleconference with defendant's counsel, which conference did not result in defendant providing overdue discovery responses or in any other way resolve the discovery disputes that are the subject of this motion to compel.

/s/ Irwin Schwartz

Irwin B. Schwartz

Certificate of Service

I, Irwin B. Schwartz, attorney for Plaintiff iRacing.com Motorsport Simulations, LLC, hereby certify that on this 7th day of November 2005, I filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to: Joseph F. Ryan, Lyne Woodworth & Evarts LLP, 600 Atlantic Avenue, Boston, MA 02210, counsel for Defendant Tim Robinson.

/s/ Irwin Schwartz

Irwin B. Schwartz

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Defendant.

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FIRST
INTERROGATORIES TO
DEFENDANT
TIM ROBINSON

X

Pursuant to Fed. R. Civ. P. 33 and in accord with the definitions and instructions that follow these interrogatories, iRacing.com Motorsport Simulations, LLC ("iRacing") hereby requests that you respond to the following interrogatories within 30 days after service hereof.

INTERROGATORIES

Interrogatory No. 1:

Identify all applications you have created or participated in creating, which applications: (a) derive from, transform or otherwise modify NASCAR® 2003 source code; or (b) defeat NASCAR® 2003's copy protection.

Interrogatory No. 2:

Identify all applications you have used that: (a) derive from, transform or otherwise modify NASCAR® 2003 source code; or (b) defeat NASCAR® 2003's copy protection.

Interrogatory No. 3:

Identify each and every person who participated in the creation of the NASCAR® 2003 Modifications, and, for each such person, identify the manner in which they participated.

Interrogatory No. 4:

Identify each and every person who participated in the distribution of the NASCAR® 2003 Modifications, and, for each person, identify the manner in which they participated.

Interrogatory No. 5:

Identify any hex editing tools or other reverse engineering tools used in the creation of the NASCAR® 2003 Modifications and the source(s) from which each such tool was obtained.

Interrogatory No. 6:

Identify all websites or domain names through which you have offered the NASCAR® 2003 Modifications for download.

Interrogatory No. 7:

For each website you identified in response to Interrogatory No. 6, identify all persons who contribute or have contributed to its content or existence, including, but not limited to, its owners, administrators and contributing members. For each such person, identify: (a) his or her particular role(s) with respect to each website; (b) the privileges that person has on each website to which he or she contributes.

Interrogatory No. 8:

Identify all persons who are wholly or partially responsible for posting the NASCAR® 2003 Modifications for download on any of the websites you identified in response to Interrogatory No. 6.

Interrogatory No. 9:

Identify all persons who are wholly or partially responsible for hyperlinking to the NASCAR® 2003 Modifications (or to websites that offer the NASCAR® 2003 Modifications for download) from any of the websites you identified in response to Interrogatory No. 6.

Interrogatory No. 10:

Identify all persons you know who downloaded any of the NASCAR® 2003 Modifications.

Interrogatory No. 11:

Identify all communications between you and iRacing.

Interrogatory No. 12:

Identify the person(s) who sent you Steve Myers' post from the FIRST beta forum, which post is attached to these Interrogatories as Exhibit A.

DEFINITIONS AND INSTRUCTIONS

1. iRacing incorporates by reference the Uniform Definitions In Discovery Requests contained in Local Rule 26.5. The meaning of all non-defined terms shall be in accordance with their ordinary and accepted usage.

2. In addition, "document" means all software programs, electronic data files, including word processing documents, spreadsheets, database files, charts, drafts,

outlines, e-mail, PIF files, batch files, source code, object code, executable files, configuration files and deleted files. "Document" also means all other electronic data stored on computer memories, hard disks, floppy disks, cd-rom, or any other method.

3. In addition, "identify" (with respect to persons) means to give, to the extent known, the person's full name, present or last known address, user name, member name, email address, and, when referring to a natural person, the present or last known place of employment.

4. "iRacing" or "plaintiff" means plaintiff iRacing.com Motorsport Simulations, LLC and its officers, directors, agents, representatives, employees, predecessors and assigns.

5. "NASCAR® 2003" means the NASCAR® Series 2003 Season computer software program and any transformative or derivative works thereof.

6. "NASCAR® 2003 Modifications" means all applications you identify in response to Interrogatory No. 1 or Interrogatory No. 2.

7. "Robinson", "you" and/or "your" means defendant Tim Robinson and his agents, representatives, employees, assigns and registered domain names, including www.ow-racing.com, www.torn8oalley.com, and www.first-racing-sucks.com.

8. If you object to any of these interrogatories, you must state the specific ground for each objection.

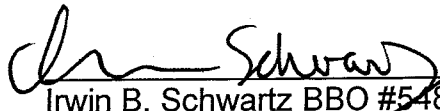
9. These interrogatories are continuing, and you have a duty seasonably to amend your responses to them if you later learn that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to iRacing during the discovery process or in writing.

DATED: September 23, 2005

Respectfully submitted,

iRacing.com Motorsport Simulations, LLC

By its attorneys,

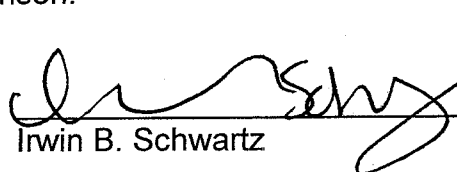
 by Kayla Hutton
Irwin B. Schwartz BBO #548763
Petrie Schwartz LLP
500 Boylston Street, Suite 1860
Boston, Massachusetts 02116
(617) 421-1800
(617) 421-1810 (fax)

Certificate of Service

I, Irwin B. Schwartz, attorney for Plaintiff, iRacing.com Motorsport Simulations, LLC, hereby certify that on this 23d day of September, 2005, I served a copy of the foregoing document on Defendant by delivering the same, via United States mail, postage prepaid to:

Joseph F. Ryan
Lyne Woodworth & Evarts LLP
600 Atlantic Avenue, Boston
MA 02210

Counsel for Defendant Tim Robinson.

 by Kayla Hutton
Irwin B. Schwartz

<input checked="" type="checkbox"/> Old 08-13-2005, 04:27 AM	
Steve.Myers Administrator	<input checked="" type="checkbox"/> Steve.Myers is online now
	Team: Join NE - Date: New Sep 2004 England (USA) Location: United States Posts: 41
<p>As many of you had probably seen, OW-Racing.com decided to post for download their 2005 Open Wheel mod with a hacked exe. This exe not only modified values in our physics model, but also defeated copy protection.</p> <p>As all of you are aware, we have contacted anyone and everyone that we feel may be violating our copyrights. We had more personal interaction with Tim Robinson than all other mod groups combined. After spending quite a bit of effort trying to teach Mr. Robinson the finer points of copyright law, he went ahead and posted his illegal modification anyway.</p> <p>As you can see, we had no other choice but to take Mr. Robinson to court. I know that some may see our actions as heavy handed. The reality is that we have only pursued legal action against two individuals that refuse to respect our rights. I do hope that this is the last time we have to go down this road, but I promise we will continue to protect our property.</p> <p>If anyone has any questions regarding this issue, I will do my best to answer them.</p> <p>Steve</p>	

EXHIBIT A

UNITED STATES DISTRICT COURT
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Defendant.

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SECOND REQUESTS
FOR PRODUCTION OF
DOCUMENTS TO
DEFENDANT
TIM ROBINSON

X

Pursuant to Fed. R. Civ. P. 34 and in accord with the definitions and instructions that follow these requests, iRacing.com Motorsport Simulations, LLC ("iRacing") requests that, within 30 days after service of these requests for production, you produce all responsive, non-privileged documents in your possession, custody or control for inspection and copying at Petrie Schwartz LLP, 500 Boylston Street, Suite 1860, Boston, Massachusetts 02116.

DOCUMENTS REQUESTED

Request No. 2:

Produce each and every document discussing, referring or relating to NASCAR® 2003, including any modifications, transformative works or derivative works thereof.

Request No. 3:

Produce each and every document discussing, referring or relating to any hex editing tools or other reverse engineering tools you used with respect to

NASCAR® 2003.

Request No. 4:

Produce each and every document discussing, referring or relating to the End User License Agreement ("EULA") for NASCAR® 2003.

Request No. 5:

Produce each and every document discussing, referring or relating to the applications called "owr2k5_v1.0.0.1.zip" and "owsc_nocd_temp.zip."

Request No. 6:

Produce each and every document discussing, referring or relating to any and all downloads offered on www.ow-racing.com, www.torn8oalley.com, and/or www.first-racing-sucks.com, which downloads: (a) derive from, transform or otherwise modify NASCAR® 2003 source code; or (b) defeat NASCAR® 2003's copy protection.

Request No. 7:

Produce each and every document discussing, referring or relating to the beta version of racing software that: (a) iRacing was developing but had not yet released; and (b) you tested pursuant to the terms and conditions of the Confidential Disclosure Agreement.

Request No. 8:

Produce each and every document discussing, referring or relating to any communication between you and iRacing.

Request No. 9:

Produce each and every document you identified in your responses to the First

Interrogatories that iRacing served on you contemporaneously with these Requests for the Production of Documents.

Request No. 10:

Produce each and every document to which you referred in formulating your responses to the First Interrogatories that IPC served on you contemporaneously with these Requests for the Production of Documents.

DEFINITIONS AND INSTRUCTIONS

1. iRacing incorporates by reference the Uniform Definitions In Discovery Requests contained in Local Rule 26.5. The meaning of all non-defined terms shall be in accordance with their ordinary and accepted usage.

2. In addition, "document" means all software programs, electronic data files, including word processing documents, spreadsheets, database files, charts, drafts, outlines, e-mail, PIF files, batch files, source code, object code, executable files, configuration files and deleted files. "Document" also means all other electronic data stored on computer memories, hard disks, floppy disks, cd-rom, or any other method.

3. "iRacing" or "plaintiff" means plaintiff iRacing.com Motorsport Simulations, LLC and its officers, directors, agents, representatives, employees, predecessors and assigns.

4. "NASCAR® 2003" means the NASCAR® Series 2003 Season computer software program and any transformative or derivative works thereof.

5. "Robinson", "you" and/or "your" means defendant Tim Robinson and his agents, representatives, employees, assigns and registered domain names, including

www.ow-racing.com, www.torn8oalley.com, and www.first-racing-sucks.com.

6. If you object to any request contained herein, for each item or category to which you object:

- (a) State the specific ground for each objection;
- (b) Identify each such document by giving its date, the name of each author (and each addresser, if different), the name of each addressee (and each recipient, if different) and by giving any other information necessary to identify such document or part thereof; and
- (c) Provide a description of the subject matter of each document or item.

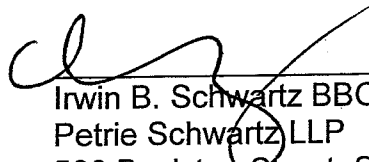
7. These requests for production of documents are continuing, and to the extent that you or your counsel subsequently acquire documents that would supplement your responses to these requests, iRacing requests that you timely serve supplemental responses to these requests and produce all responsive documents.

DATED: September 23, 2005

Respectfully submitted,

iRacing.com Motorsport Simulations, LLC

By its attorneys,

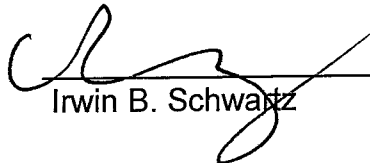
 by Kayla Hotten
Irwin B. Schwartz BBO #548763
Petrie Schwartz LLP
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Joseph F. Ryan
Lyne Woodworth & Evarts LLP
600 Atlantic Avenue, Boston
MA 02210

Counsel for Defendant Tim Robinson.

 by Kayla Hotten
Irwin B. Schwartz